

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | |
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| |) | |
| Petition for Rulemaking of |) | RM-11303 |
| Fibertech Networks, LLC |) | |
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COMMENTS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) hereby submits the following comments in support of the petition of Fibertech Networks, LLC (“Fibertech”), requesting the Commission adopt a series of “best practices” that address the need for improved competitor access to utility poles and conduits.

I. INTRODUCTION AND SUMMARY.

McLeodUSA provides local, long distance, data, and Internet access services in the Midwest, Northwest, Southwest and Rocky Mountain states, but its fiber network is principally located in upper Midwestern states. In its petition for rulemaking, Fibertech has effectively described arduous processes imposed by utilities in their management of essential pole and conduit assets, and McLeodUSA has been struck by the similarity of its own experience to those described by Fibertech. Fibertech has recommended a number of “best practices” that will help to relieve the problem, and McLeodUSA is pleased to offer its strong support of Fibertech’s petition.

The Commission has correctly said in the past that pole attachments are crucial to the development of competition.¹ McLeodUSA knows of no practical way for competitive communications providers to construct redundant pole lines where poles already exist, and conduit construction cannot be economically justified in many circumstances. Therefore, to accomplish the FCC's goal of expanding facility-based competition, competitors must have efficient access to existing utility poles and conduit.

II. DISCUSSION.

McLeodUSA supports the petition of Fibertech, which asks that the Commission adopt a series of "best practices" to facilitate pole and conduit access. What is remarkable is that so many of Fibertech's proposals have already been endorsed by the Commission in its prior rulemakings and in the published records of its enforcement actions.

A. The Commission should require pole owners to permit use of boxing and extension arms in appropriate circumstances.

McLeodUSA agrees with Fibertech that boxing of poles and use of extension arms can be a reasonable means of adding capacity to utility poles. Several of the electric utilities with which McLeodUSA has pole attachment agreements have consistently declared that the use of extension arms is prohibited for technical reasons, even though extension arms and standoff assemblies are an accepted practice for pole attachments in the telecommunications industry.² Moreover, McLeodUSA personnel have observed that pole boxing and extension arms have been widely used by telephone utilities throughout its service area, even on some of the utilities' poles

¹ See, e.g., *In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report & Order, 13 FCC Rcd 6777, FCC 98-20, at ¶ 2 (rel. Feb. 6, 1998).

² See BLUE BOOK – MANUAL OF CONSTRUCTION PROCEDURES § 3.3 (Bellcore Communications Research, Inc., Special Report SR-1421, Issue 3, December 1998) (hereinafter, the "Bellcore Blue Book") (stating that use of standoff assemblies are an "optimal method of providing required clearance").

where such practices are supposedly prohibited. Fibertech suggests there should be three criteria for allowing boxing of poles and extension arms: (a) when they would render unnecessary a pole replacement or rearrangement of other carriers' facilities; (b) when facilities on the pole are accessible by ladder or bucket trucks; and (c) when the pole owner has previously allowed such techniques. McLeodUSA agrees with these criteria. However, it may not be necessary to make boxing of poles and use of extension arms contingent on the pole owner having previously allowed such techniques.

B. The Commission should establish shorter survey and make-ready time periods.

Of all the utilities from which McLeodUSA obtains pole and conduit attachments, only AT&T(SBC) provides a clearly defined process for seeking access to its structures.³ Except in cases where pole and conduit leasing is covered by a tariff, virtually every utility provides a form of pole attachment agreement that the attaching party must sign.⁴ Such agreements are heavily weighted toward transferring risks to the attaching party and limiting the obligations of the pole owner. Seldom does the agreement make any promises as to processes for obtaining attachment licenses and the timing of surveys and make-ready work.⁵ Even where survey and make-ready time frames are clearly set forth, as in AT&T(SBC)'s processes, they clearly add up to more than 90 days in many cases. Moreover, the most significant problem with the 45-day timetable set

³ See GUIDELINES FOR ACCESS TO SBC COMMUNICATIONS INC. AND OPERATING COMPANIES STRUCTURE/SBC-13STATE (SBC Communications Inc., May 13, 2003), available at <http://asac.ameritech.com/guideline.asp>.

⁴ See, e.g., APPENDIX FOR ACCESS TO SBC COMMUNICATIONS, INC.'S STRUCTURE (POLES, CONDUITS AND RIGHTS OF WAY) SBC-13STATE/CLEC (SBC Communications Inc., Nov. 7, 2000), available at <http://asac.ameritech.com/guideline.asp>.

⁵ AT&T(SBC)'s agreement is a partial exception to this rule, in that it sets forth a time frame in which SBC will complete its survey work, but does not limit the amount of time that AT&T(SBC) can take to complete its own make-ready work. *Id.* However, Licensed attachers other than AT&T(SBC) are allowed up to 60 days to complete their make-ready work to accommodate a new attaching party's facilities. *Id.* at ¶ 31.2.

forth by the Commission for pole and conduit owners to perform their approval processes is that the owners may either approve or deny applications during that 45-day period.⁶ When an application is denied, the process ordinarily starts all over again, in which case the combined time frames for repeated for applications and make-ready work can easily exceed 180 days. Finally, the problem is worsened when utilities provide no preliminary data as to the location of available conduit, which requires the applicant to submit speculative route plans, sometimes without end points, leading to the possibility of multiple denials of an application. To help resolve these problems, the Commission should: (a) require utilities to clearly set forth in writing their application processes and time frames for the utility's performance which conform with applicable law; (b) require that time frames for survey work and make-ready be combined and/or coordinated; (c) require that small projects have shorter time frames than large ones, so that applications for short segments of conduit or a small number of poles can be completed within less than 45 days; and (d) require that whenever a route plan is denied, the utility must meet promptly with the applicant in person, to develop an alternate route that is likely to be available.

C. The Commission should allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.

McLeodUSA strongly agrees with Fibertech that pole owners should be required to pre-approve contractors for make-ready surveys and make-ready work, and that pole owners should not be allowed to attach unreasonable conditions to use of pre-approved contractors that have the effect of nullifying the ability to use such contractors. In addition to this alternative, McLeodUSA suggests that the Commission should consider urging pole and conduit owners to cooperate in developing regional accreditation programs for survey and make-ready contractors.

⁶ 47 C.F.R. § 1.1403.

That alternative would promote the interests of attaching parties, who have a strong interest in enlarging the lists of qualified contractors, thereby containing the cost of pole and conduit surveys and make-ready work. The accreditation program would also enhance the interests of utilities, whose own contractors have sometimes been less than fully qualified and often provide inaccurate surveys, in McLeodUSA's experience.

It is remarkable that further clarification by the Commission is needed to establish that pole and conduit owners must permit attaching parties to use qualified contractors to perform surveys and make-ready work. That decision was made by the Commission in unmistakable terms, in the *Local Competition Order*, released in 1996, and confirmed in 1999, as pointed out by Fibertech.⁷ It has been McLeodUSA's experience that when utilities refuse to allow contractors to perform make-ready work, their refusal is usually attributed to an alleged prohibition in their collective bargaining agreements. The Commission should request comments as to whether a collective bargaining agreement can have the effect of preempting the Commission's rules in this respect. If such agreements must constitute an exception to the Commission's otherwise clear rule allowing the use of outside contractors, then Commission should consider measures that would minimize the impact on competitors.

For those pole owners who would not allow accredited contractors to perform make ready work on their facilities, the approved contractor or accreditation alternatives would still be practical for pole survey contractors, because pole surveys do not require contact with any

⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, (the "Local Competition Order") First Report and Order, 11 FCC Rcd. 15499 (rel. Aug. 8, 1996) at ¶ 1182; *see, also*, Local Competition Order, Order on Reconsideration, 14 FCC Rcd. 18049 (rel. Oct. 26, 1999) at ¶ 86.

facilities on a utility pole. Accordingly, potential concerns with a particular utility's safety practices or collective bargaining agreements would not apply.

D. The Commission should require pole owners to allow installation of drop lines to satisfy customer service orders without prior licensing.

The issue of drop lines was addressed by the Cable Service Bureau in its 2000 decision in the *Mile High Cable* case, in which it stated that “drop poles are subject to notification requirements but not prior approval requirements separate from the approval of the attachment for which it is an adjunct.”⁸ Arguments in favor of Fibertech's proposed drop line policy are two-fold: (a) the time lines for issuing licenses for primary routes are too long for drop lines; and (b) the risks to the pole owner of an improper attachment are less on drop service lines than on primary routes. Time frames for installation of drop lines are important for competitive reasons. In general, drop lines are closely associated with activating new subscribers' service. A service drop cable is more commonly installed to a particular building only after the first subscriber orders service. Competitive carriers focus their construction dollars on buildings where a customer order has been received. Therefore, once the customer has ordered service from a competitor, the installation interval becomes an urgent matter. Therefore, the ordinary time frames for licensing of pole attachments in large primary construction project are unreasonably long when applied to attachments to a drop line.

The risks to the pole owner of allowing attachments to drop poles without prior licensing are less than would occur in the case of “main line” installations. In McLeodUSA's experience, drop poles have fewer attachments, so they are less apt to be overloaded or have guying requirements. Fibertech proposes a rule in which the attaching party would notify the pole

⁸ *Mile Hi Cable Partners v. Public Service Co.*, PA 98-003, Order, 15 FCC Rcd. 11450 ¶ 20 (Cable Serv. Bur. 2000)

owner after making an attachment to a drop pole, and McLeodUSA supports that rule. Any pole attachment made improperly could then be corrected by the attaching party. The necessity of correcting improper attachments would deter haphazard work, and the avoidance of unauthorized attachment fees would provide incentive to report drop pole attachments in a timely manner, prior to discovery in a pole audit.⁹

E. The Commission should require utilities to allow competitors to search utility records and survey manholes to determine availability of conduit, and limit charges if the utility performs these functions.

The processes of searching utility records and surveying manholes have produced many of the disagreements between pole owners and attaching parties. Typically, the areas of dispute are violations of acceptable time frames, whereby the utility fails to complete these tasks within the 45 days allowed by the Commission's rules, and the very high fees that are sometimes charged by utilities for these services. It is the opinion of McLeodUSA that one of the easiest methods of avoiding excessive survey fees and time frames is to allow attachers to review records and conduct surveys using their own independent contractors. Pole and conduit owners are entitled to recover their costs of having contractors work on their premises to conduct office record reviews, and of having utility employees review survey work for accuracy. However, as the Commission has said in the past, survey charges must be limited to the pole owner's actual costs.¹⁰ In McLeodUSA's experience, some utilities continue to impose fixed up-front charges for surveys, calculated on a per-pole basis, in violation of the Commission's rules. McLeodUSA strongly endorses Fibertech's recommended action.

⁹ See, generally, *Mile Hi Cable Partners*, 15 FCC Rcd. 11450 at ¶¶ 19-20.

¹⁰ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *Order on Reconsideration*, 14 FCC Rcd. 18049 (rel. Oct. 26, 1999) at ¶ 107; *Cable Television Ass'n v. Georgia Power Co.*, PA 01-002, *Order*, 18 FCC Rcd. 16333 (Enforcement Bur. 2003)

F. The Commission should require incumbent local exchange carriers (“ILECS”) to share building-entry conduit with competitive LECs and cable providers. The Commission should also clarify that this rule applies to conduit that enters ILEC central offices.

Building entry conduit is a crucial asset. In the experience of McLeodUSA, Fibertech makes an accurate statement when it says that “landlords are extremely reluctant to permit the drilling of additional holes in building foundations to accommodate new conduit.”¹¹ Fibertech’s proposed rule is reasonable and should be adopted by the Commission.

McLeodUSA also wishes to emphasize the importance of applying the rules of Section 224 to the conduit facilities that provide access to the vault at an ILEC Central Office, and to urge the Commission to take steps that ensure such conduit is made available. The Commission has previously recognized the importance of central office conduit access and assumed in its analysis of impairment in the *TRRO* that “existing conduit [would be] available to competitive carriers that seek to deploy their own transport facilities.”¹² ILECs’ claims that building-entry conduit space is not available impedes the ability of CLECs, including McLeodUSA, to provide competitive transport service to carriers collocated in these central offices. The Commission’s decision to eliminate access to unbundled network elements in certain circumstances was predicated on the availability of substitute competing fiber optic facilities at central offices, for which access to the ILECs’ building entry conduit is essential.

In summary, McLeodUSA supports Fibertech’s proposed best practice that ILECs be required to share building entry conduit with competitive providers, including conduct that access ILEC central offices.

¹¹ Fibertech Petition at 35.

¹² Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd. 2533 ¶ 77 (2005).

III. CONCLUSION.

Existing poles and conduit structures are critically important to competitive carriers, but are often unavailable due to excessive monetary demands and inefficient processes of utilities, combined with the unequal bargaining power that pole and conduit owners enjoy. Fibertech has effectively described an environment in which access problems for competitors continue, and McLeodUSA's experience has been similar in many respects. McLeodUSA urges the Commission to initiate a rulemaking to adopt the "best practices" advocated by Fibertech. McLeodUSA hopes that its own experiences, as described in these comments, will help to convince the Commission that such a rulemaking is required.

Respectfully submitted,

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